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Opinion No. 04-025

Protection from civil or criminal liability for medical personnel taking blood samples

QUESTIONS

1. Do the protections from criminal and civil liability that are afforded medical personnel who draw blood for blood-alcohol tests pursuant to Tenn. Code Ann. § 55-10-406(a)(1) apply when the blood draw is taken from an unconscious suspect or taken by force upon reasonable grounds to believe the suspect has committed aggravated assault or homicide by use of a motor vehicle?

2. If medical personnel are not entitled to the immunity provided for in Tenn. Code Ann. § 55-10-406(a)(1) in the above-stated circumstances, are they entitled to the same qualified immunity enjoyed by law enforcement officers who act in "good faith"?

OPINIONS

1. No. The statute only provides immunity for the blood tests authorized by the statute.

2. Yes. If the actions of medical personnel did not violate clearly established constitutional or statutory rights, they would enjoy qualified immunity.

ANALYSIS

1. Tenn. Code Ann. § 55-10-406 is Tennessee's Implied Consent Statute. Subsection (a)(1) of the statute provides that "[a]ny person who drives any motor vehicle in the state is deemed to have given consent to a test for the purpose of determining the alcoholic or drug content of that person's blood; provided, that such test is administered at the direction of a law enforcement officer having reasonable grounds to believe such person was driving while under the influence of an intoxicant or drug, as defined in § 55-10-405." Subsection (a)(3) permits a suspect to refuse to submit to a blood test, and if one is administered while the suspect is unconscious, subsection (b) permits the suspect to refuse to consent to the introduction of the blood tests at trial. In either situation, subsection (a)(1) provides that medical personnel who, "acting at the written request of a law enforcement officer, withdraw[] blood from a person for the purpose of making such test, shall not incur any civil or criminal liability as a result of the withdrawing of such blood, except for any damages that may result from the negligence of the person so withdrawing." This language clearly contemplates immunity only for the types of blood tests provided for in the statute.

In contrast to 55-10-406, both federal and state case law permit the drawing of blood for blood-alcohol testing, even over the objections of the defendant and by force if such force is objectively reasonable, when a police officer has probable cause to believe that the accused committed the offense of aggravated assault or vehicular homicide. *State v. Jordan*, 7 S.W.3d 92, 99 (Tenn. Crim. App. 1999)(citing *Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). However, the *Jordan* testing provisions are not incorporated in Tenn. Code Ann. § 55-10-406; in fact, subsection (e) clearly distinguishes *Jordan* testing from the blood tests provided for in the statute.[1] Accordingly, it is the opinion of this office that the immunity provisions of Tenn. Code Ann. § 55-10-406 do not extend to blood tests performed pursuant to *State v. Jordan*.

2. However, medical personnel performing *Jordan* blood testing would be entitled to qualified immunity. The defense of qualified immunity is available to public officials whose conduct conforms to a standard of objective legal reasonableness. *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982). Under this standard, governmental officials performing discretionary functions will be shielded from liability for civil damages as long as their conduct does not violate the clearly established constitutional or statutory rights of which a reasonable person would have known. *Id.*, 457 U.S. at 818, 102 S.Ct. at 2738; *Payne v. Breuer*, 891 S.W.2d 200, 202 (Tenn.1994). In order for a statutory or constitutional right to be "clearly established," its contours must be so clear that a reasonable official would understand that what he or she is doing violates that right; the unlawfulness of the act must be apparent in light of the pre-existing law. *Malley v. Briggs*, 475 U.S. 335, 344 45, 106 S.Ct. 1092, 1097-98 (1986).

Since the law permits forcible blood tests, it cannot be said that such would constitute a violation of a “clearly established” right. With regards to non-government employees performing blood tests on behalf of the state, there is a split of authority regarding whether such agents enjoy the same qualified immunity. No Tennessee cases address the subject; however, the Sixth Circuit has opined that agents working on behalf of the state are entitled to qualified immunity when they are “principally concerned with enhancing the public good,” as opposed to acting “for the good of the pocketbook.” *McKnight v. Rees*, 88 F.3d 417, 424 (6th Cir. 1996). Since blood tests constitute important evidence in the prosecution of serious crimes and are only initiated by a request from a law enforcement officer, it is the opinion of this office that qualified immunity would shield private medical personnel drawing blood at the state’s request.

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[1]Tenn. Code Ann. § 55-10-406(e) provides that “[n]othing in this section shall affect the admissibility in evidence, in criminal prosecutions for aggravated assault or homicide by use of a motor vehicle only, of any chemical analysis of the alcoholic or drug content of the defendant’s blood which has been obtained by any means lawful without regard to the provisions of this section.”

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